90-779

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1990

QUENTIN L. BREEN,

Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

ON A WRIT OF CERTIORARI FROM THE COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

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November 13, 1990

QUESTIONS PRESENTED

The special and important question for review is whether fundamental elements of due process were afforded petitioner herein.

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
STATEMENT OF THE CASE	2
ARGUMENT	5
CONCLUSION	10
APPENDIX A	1a
APPENDIX B	1b
APPENDIX C	1c
APPENDIX D	1d
APPENDIX E	1e
APPENDIX F	1f

TABLE OF AUTHORITIES

Cases	PAGE(S)
Grannis v. Ordean 234 U.S. 385 (1914)	5
McPartlin v. Commissioner 653 F.2d 1185 (7th Cir. 1981)	7
Milliken v. Meyer 311 U.S. 457 (1940)	5
Mullane v. Central Hanover Bank & Trust Co. 339 U.S. 306 (1950)	5
United States v. Zolla 724 F.2d 808 (9th Cir. 1984)	6
Constitutional Provisions	
Fifth Amendment	5
Article III	2
Internal Revenue Code	
Section 6212	6

PARTIES TO PROCEEDING BELOW

All parties involved appear in the caption of the case as set forth herein.

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PETITION FOR CERTIORARI

The petitioner herein respectfully prays that a writ of certiorari issue to review the Ninth Circuit affirmance of a decision of the United States Tax Court, which Ninth Circuit decision was filed August 16, 1990.

OPINIONS BELOW

The decision of the United States Tax Court in *Quentin L. Breen v. Commissioner of Internal Revenue* was filed June 6, 1988. Further decisions of the United States Tax Court were filed April 11, 1989, April 13, 1989 and July 14, 1989. The Tax Court decisions and the Ninth Circuit opinion are printed in Appendix A, B, C, D, E and F.

JURISDICTION

Jurisdiction to review the determination of the Ninth Circuit Court of Appeals is conferred by Article III of the United States Constitution. This petition was placed in the mail of the U.S. Postal Service to the Court within 90 days of the August 16, 1990 Ninth Circuit Court decision.

STATEMENT OF THE CASE

The relevant facts of this case are set forth as follows:

(A) Course of proceeding in the case before the Court.

This case arose upon timely petitions to the United States Tax Court for redeterminations of the proposed tax deficiencies and statutory additions for the 1969 and 1970 income tax years. The Tax Court granted respondent's motion to dismiss the petition for lack of prosecution and entered its decision June 6, 1988. Petitioner filed a motion with the Tax Court to set aside the dismissal which was denied. The petitioner made a timely motion to the Tax Court to reconsider its denial, which motion was denied. Petitioner appealed such denial to the U.S. Court of Appeals

for the Ninth Circuit. In a decision entered August 16, 1990 the Ninth Circuit affirmed the determination by the Tax Court.

(B) Relevant facts concerning question presented.

On February 28, 1978, petitioner, Quentin Breen, timely filed petitions with the Tax Court in response to Notices of Deficiency issued by the Internal Revenue Service for the income tax years 1969 and 1970 which determined deficiencies of $58,151.00, and $50,312.00 respectively plus statutory additions for both years. The petitions were filed pro se by Quentin Breen showing both his residence and business addresses. Respondent filed a timely answer to the petitions. The place for the Trial was set for San Francisco and respondent's San Francisco District Counsel's office was counsel of record for respondent.

Apparently, the case was not assigned to a Judge until June 11, 1986, eight years after the petition was filed. By that time petitioner had moved both his residence and his office. He did not notify the Tax Court of his new addresses but the respondent did have such knowledge.

An order was issued by Judge Vandervort setting a pretrial conference in the case for February 22, 1988, and a trial date of May 16, 1988. The petitioner did not receive notice of these dates and, therefore, did not appear at the pretrial conference. At the pretrial conference, the Court instructed respondent to contact the petitioner prior to the trial date.

On May 16, 1988, the case was called for trial. Petitioner still had not received notice of the trial date. Since petitioner did not appear, respondent moved to dismiss the petition for lack of prosecution. Respondent represented that it had "made an independent effort to locate and contact petitioner . . . but these efforts have been unsuccessful." (Respondent's Motion to Dismiss for Lack of Prosecution dated May 16, 1988.) Respondent made no representation

as to what steps, if any, it took to locate petitioner. In fact, petitioner's residence and business addresses were in respondent's computer files at the Fresno Service Center and the San Francisco District Director's Office. Nevertheless, the Tax Court granted respondent's motion by order entered June 6, 1988.

The result of this decision was that the respondent was permitted to assess the full amounts of the deficiencies and penalties per the deficiency notices. Collection notices were then sent by respondent to the petitioner threatening to levy and seize his property. Petitioner received these collection notices in January 1989. This was the first notice petitioner had regarding the matters which he believed were still pending in the Tax Court.

Shocked that the proposed deficiency amounts had been assessed, on January 30, 1989, petitioner filed motions with the Tax Court to set aside the dismissal and to return the case to the Tax Court trial docket. These motions were denied by orders issued April 11 and 13, 1989. On May 15, 1989, motions for reconsideration were filed by petitioner with the Tax Court. These motions were denied by order dated July 14, 1989. There was a timely appeal to the Court of Appeals for the Ninth Circuit which, by order dated August 16, 1990, affirmed the decisions of the Tax Court.

During the period 1983 through 1988, IRS collection officers had been in frequent contact with petitioner about other tax matters at his new business address at the World Trade Center Building in San Francisco and at his new home address. A Revenue Officer of the San Francisco Collection Division was in contact with petitioner by mail, telephone, and personal contact several times during 1987 and 1988. An IRS Revenue Agent conducted an audit at petitioner's new residence in 1983 and 1984.

In addition, in 1988, petitioner's business and home telephone numbers as well as addresses were listed in the telephone book. Petitioner continuously resided in or about the San Francisco Bay Area from the filing of the petition. As a licensed and practicing attorney in good standing with the California State Bar, petitioner's current addresses were on file with the State Bar.

ARGUMENT

The fundamental issue in this case is whether petitioner was denied the due process guaranteed to him by the Fifth Amendment to the U.S. Constitution as a result of the failure to give him notice of the trial date, the dismissal with prejudice of his petition when he did not appear on that date and the denial of his motion to set aside the dismissal which was upheld by the Ninth Circuit.

The legal standard for due process in any proceeding which is to be accorded finality was articulated by this Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

> ". . . notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . The notice must be of such nature as reasonably to convey the required information" at 314, citing *Milliken v. Meyer*, 311 U.S. 457 and *Grannis v. Ordean*, 234 U.S. 385.

A Tax Court proceeding is the type of proceeding to which the *Mullane* standard applies. Moreover, substantial consequences flow from Tax Court decisions. If the respondent prevails in a Tax Court proceeding, it is entitled to assess deficiencies and statutory accruals. If the assessments are not paid promptly, the complete arsenal of administrative

collection weapons are available to respondent. These are indeed formidable. Property can be seized and sold and liens will attach without any further judicial proceeding.

Identical consequences flow from the failure to file a timely petition in the Tax Court in response to a Notice of Deficiency. Because of these consequences, Congress saw fit to enact specific due process standards which are embodied in IRC Section 6212. Section 6212, inter alia, requires the respondent to send the Notice of Deficiency to the taxpayer's "last known address."

The Court of Appeals for the Ninth Circuit has interpreted this due process standard to require the respondent to perform a computer search to determine if there is a return on file which gives a more current address for the petitioner. See *United States v. Zolla,* 724 F.2d 808, 810-11 (9th Cir. 1984).

It is the petitioner's position that, at the very least, this due process standard applies in the instant case. That is, before the Tax Court dismisses a petition where the petitioner does not appear and it knows that the Court's notices have not been received by petitioner, there should be performed by the respondent a computer search for a more recent address.

In the instant case at Bar, there are no allegations or representations by respondent that this was done. In fact, respondent's only representation was a bald assertion in its written Motion to Dismiss that it "made an independent effort to locate and contact petitioner". Surely, such a vague and meaningless statement is not a sufficient showing of respondent's steps to assure petitioner of his constitutionally guaranteed due process. It certainly could not suffice under IRC Section 6212 as a mailing to a taxpayer's "last known address." No computer search or other serious attempt was made since it would have revealed the petitioner's new

home and office addresses that were at the time on file at the Fresno Service Center Collection Division and at the San Francisco District Director's office.

The Tax Court failed to inquire as to the specific steps, if any, taken by respondent to locate petitioner and this was an error resulting in the denial of due process. The Court's refusal to set aside the dismissal or to reconsider was an abuse of discretion and therefore, it was clearly erroneous for the Ninth Circuit to affirm.

In addition we believe that the circumstances in this case are on all fours with the facts in *McPartlin v. Commissioner,* 653 F.2d 1185 (7th Cir. 1981). There, a Notice of Deficiency which was mailed in April 1978 to the address appearing on petitioners' 1971 return under examination was found not to have been mailed to their last known address. The Seventh Circuit determined that under the facts of that case the respondent was deemed to have actual knowledge of the taxpayers' new address. The relevant factors which led the Seventh Circuit to this conclusion were:

1. Taxpayers had mailed two documents which bore their new address to the IRS Service Center.

2. The Service Center had communicated by mail with the taxpayers at their new address.

3. An agent conducting a criminal investigation of the taxpayers was well aware of the taxpayer's new address.

4. The taxpayers did nothing to conceal their new address from the Commissioner.

5. The Commissioner's District Office had sent a Notice of Tax Lien to taxpayers' new address.

The facts in the instant case are substantially the same:

1. While the Tax Court case was pending, the San Francisco District Director's Office Collection Division had been in contact with petitioner by mail at petitioner's current business address.

2. A Revenue Officer of the San Francisco Collection Division was in contact with petitioner by mail, telephone, and personal contact several times during 1987 and 1988.

3. The IRS San Francisco Collection Division on several occasions had been in contact with petitioner by mail from 1983 to 1987 with respect to a written Offer in Compromise filed in the San Francisco District Office by petitioner for the years 1971, 1972, and 1973.

4. The petitioner was known by respondent to be a licensed and practicing attorney in good standing with the State Bar of California.

5. An IRS Revenue Agent of the San Francisco Examination Division conducted an audit at petitioner's new residence in 1983 and 1984.

6. The petitioner has continuously resided in or about the San Francisco Bay Area from the filing of the petition.

Consequently, on the basis of *McPartlin* the respondent is deemed to know the petitioner's current address at the time it represented it could not locate him, which misrepresentation caused the denial of petitioner's due process rights.

In sum, the petitioner's Tax Court case was dismissed due to his failure to appear, without providing him notice of the date for his appearance. The Tax Court and respondent were required to provide notice reasonably calculated to apprise him of the hearing date. The respondent failed to conduct any meaningful search including the minimally required computer search, which would have revealed the more current address.

In addition, other offices of respondent within the same district as counsel for respondent as well as the Fresno Service Center were aware of petitioner's more current address. Consequently, counsel for respondent is deemed to have actual knowledge of the current address and his failure to notify petitioner of the trial date at the current address caused the deprivation of petitioner's constitutionally guaranteed due process rights.

Moreover, the record is devoid of any facts that would support a claim by respondent that it took any steps whatsoever to attempt to notify petitioner of the trial date. Rather, it is clear that the respondent did nothing to contact petitioner even though information as to petitioner's current address was readily available.

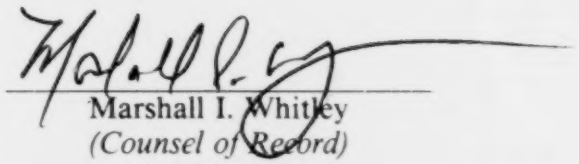
Given the grave consequences of a dismissal by the Tax Court, it should have required more of a showing from the respondent as to what steps were actually taken to notify petitioner. In any event, in the Ninth Circuit, respondent was, at the very least, required to conduct a computer search to determine a more current address for petitioner. And, perhaps more appropriately under the circumstances, respondent should be deemed to have actual knowledge of the more current address at the time it represented it could not locate petitioner.

Consequently, this Court should reverse the Ninth Circuit, order the dismissal to be set aside and reinstate the petition on the Tax Court trial calendar.

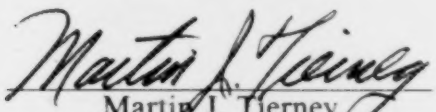
CONCLUSION

The Supreme Court should grant the writ requested herein.

Dated: November 13, 1990



Marshall I. Whitley
(Counsel of Record)



Martin J. Tierney
Associate Counsel
Attorneys for Petitioner

APPENDIX A

United States Tax Court

WASHINGTON, D.C. 20217

QUENTIN L. BREEN,
Petitioner
v.
COMMISSIONER OF
INTERNAL REVENUE,
Respondent.

DOCKET NO. 2026-78

ORDER OF DISMISSAL AND DECISION

This case was called from the calendar for the Trial Session at San Francisco, California, on May 16, 1988. There was no appearance by or on behalf of petitioner. Counsel for respondent filed a motion to dismiss for lack of prosecution. After due consideration, it is

ORDERED that respondent's motion to dismiss filed May 16, 1988, is granted and this case is dismissed for lack of prosecution. It is further

ORDERED and DECIDED that there is a deficiency in income tax due from the petitioner for the taxable year 1969 in the amount of $58,151.00 And

That there are additions to tax under Sections 6651(a) and 6653(a), Internal Revenue Code of 1954, due from the petitioner for the taxable year 1969 in the respective amounts of $14,538.00 and $2,962.00.

Arthur L. Nims III
Judge

Entered: June 6, 1988

APPENDIX B

United States Tax Court

WASHINGTON, D.C. 20217

QUENTIN L. BREEN, *Petitioner* v. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	DOCKET NO. 2048-78

ORDER OF DISMISSAL AND DECISION

This case was called from the calendar for the Trial Session at San Francisco, California, on May 16, 1988. There was no appearance by or on behalf of petitioner. Counsel for respondent filed a motion to dismiss for lack of prosecution. After due consideration, it is

ORDERED that respondent's motion to dismiss filed May 16, 1988, is granted and this case is dismissed for lack of prosecution. It is further

ORDERED and DECIDED that there is a deficiency in income tax due from the petitioner for the taxable year 1970 in the amount of $50,312.00 And

That there are additions to tax under Sections 6651(a) and 6653(a), Internal Revenue Code of 1954, due from the petitioner for the taxable year 1970 in the respective amounts of $12,453.00, $2,516.00 and $1,598.00.

Arthur L. Nims III
Judge

Entered: June 6, 1988

APPENDIX C

United States Tax Court

WASHINGTON, D.C. 20217

QUENTIN L. BREEN, *Petitioner,* v. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	DOCKET NO. 2046-78

ORDER

This case was calendared for the Special Session of the Court at San Francisco, California on May 16, 1988. Petitioner did not appear at trial and respondent filed a motion to dismiss on May 16, 1988. The Court granted respondent's motion and entered an order of dismissal on June 6, 1988.

Petitioner filed a Motion to Set Aside Order of Dismissal and to Vacate Decision and to Return to Trial Docket on January 30, 1989. Petitioner claims that he never received notice that the case was on the May 16, 1988, trial calendar in San Francisco.

A decision of this Court becomes final, in the absence of a timely filed notice of appeal, 90 days after it is entered. Section 7481;[1] section 7483. After expiration of such time, the Court has no jurisdiction to vacate, modify, or reconsider the decision. *Lasky v. Commissioner*, 352 U.S. 1027 (1957). Petitioner filed his motion more than 90 days after decision had been entered. Accordingly, it is hereby

[1] All section references are to the Internal Revenue Code, as amended and in effect for the year in question.

ORDERED that petitioner's Motion to Set Aside Order of Dismissal and to Vacate Decision and to Return to Trial Docket filed on January 30, 1989, is denied.

Arthur L. Nims III
Chief Judge

Washington, D.C.
Dated: April 11, 1989

APPENDIX D

United States Tax Court

WASHINGTON, D.C. 20217

QUENTIN L. BREEN,
Petitioner,
v.
COMMISSIONER OF
INTERNAL REVENUE,
Respondent.

DOCKET NO. 2026-78

ORDER

This case was calendared for the Special Session of the Court at San Francisco, California on May 16, 1988. Petitioner did not appear at trial and respondent filed a motion to dismiss on May 16, 1988. The Court granted respondent's motion and entered an order of dismissal on June 6, 1988.

Petitioner filed a Motion to Set Aside Order of Dismissal and to Vacate Decision and to Return to Trial Docket on January 30, 1989. Petitioner claims that he never received notice that the case was on the May 16, 1988, trial calendar in San Francisco.

A decision of this Court becomes final, in the absence of a timely filed notice of appeal, 90 days after it is entered. Section 7481;[1] section 7483. After expiration of such time, the Court has no jurisdiction to vacate, modify, or reconsider the decision. *Lasky v. Commissioner*, 352 U.S. 1027 (1957). Petitioner filed his motion more than 90 days after decision had been entered. Accordingly, it is hereby

[1] All section references are to the Internal Revenue Code, as amended and in effect for the year in question.

ORDERED that petitioner's Motion to Set Aside Order of Dismissal and to Vacate Decision and to Return to Trial Docket filed on January 30, 1989, is denied.

Arthur L. Nims III
Chief Judge

Washington, D.C.
Dated: April 13, 1989

APPENDIX E

United States Tax Court

WASHINGTON, D.C. 20217

QUENTIN L. BREEN, *Petitioner,* v. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	DOCKET NOS. 2026-78 2046-78

ORDER

This case was calendared for a Special Session of the Court at San Francisco, California on May 16, 1988. Petitioner did not appear when this case was called for trial. Respondent filed a Motion to Dismiss for Lack of Prosecution. The Court granted respondent's motion and entered an Order of Dismissal and Decision on June 6, 1988.

On January 30, 1989, petitioner filed a motion to set aside the order and to vacate the decision. Petitioner's motion was denied on April 11, 1989, on the ground that the decision of this Court had become final. On May 15, 1989, petitioner filed a Motion for Reconsideration and For Evidentiary Hearing.

After a review of the position of each of the parties, we agree with respondent that petitioner's motion should be denied on the ground that this Court does not have jurisdiction to vacate the decision of this Court entered on June 6, 1988. We agree with petitioner that we have jurisdiction to vacate a decision where it is shown that there was fraud on the Court. *Abatti v. Commissioner*, 859 F.2d 115 (9th Cir. 1988); *Toscano v. Commissioner*, 441 F.2d 930 (9th Cir. 1971). However, in the instant case petitioners have failed

to allege facts to show a fraudulent plan or scheme designed by respondent to improperly influence the Court in its decision. Accordingly, it is

ORDERED that petitioner's Motion for Reconsideration and for Evidentiary Hearing filed on May 15, 1989, is hereby denied.

Arthur L. Nims III
Chief Judge

Washington, D.C.
Dated: July 14, 1989

APPENDIX F

NOT FOR PUBLICATION

United States Court Of Appeals

FOR THE
NINTH CIRCUIT

QUENTIN L. BREEN,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE SERVICE
Respondent.

NOS. 89-70293, 89-70294
TAX CT. NOS. 2026-78
2046-78
MEMORANDUM*

Appeal from a Decision of the Tax Court of the United States

Argued and Submitted July 16, 1990
San Francisco, California

BEFORE: TANG, NOONAN AND RYMER, CIRCUIT JUDGES.

The Tax Court denied Quentin L. Breen's motion to vacate its decision dismissing his petition challenging an Internal Revenue Service ("IRS") notice of deficiency. The Tax Court also denied Breen's motion for reconsideration. Breen appeals, and we affirm.

DISCUSSION

Under the circumstances and as Breen concedes, the Tax Court could have granted his motion and vacated its final

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

judgment only if Breen showed that the IRS obtained the judgment against him through fraud on the court. *See Abatti v. Commissioner,* 859 F.2d 115, 118 (9th Cir. 1988). "We review the Tax Court's denial of leave to file the motion to vacate for abuse of discretion." *Id.* at 117. We hold that the Tax Court did not abuse its discretion in denying Breen's motions.

1. The Alleged IRS Fraud on the Court

Breen argues that the IRS defrauded the Tax Court when it represented to the court in support of its motion to dismiss that it had unsuccessfully attempted to contact Breen concerning settlement negotiations and trial preparations. We reject this argument for two reasons.

First, Breen has failed to show that the IRS misrepresented to the court that it could not locate Breen. Breen argues that the IRS should have ascertained his current address and therefore had constructive knowledge of his address. A taxpayer's last known address, as a matter of law, is the one listed on the taxpayer's last tax return. *United States v. Zolla,* 724 F.2d 808, 810-11 (9th Cir. 1984). In this circuit, we presume the IRS knows this last address. *Id.* Breen asks us to extend this rule to include addresses known independently to IRS investigators or ascertainable by the IRS through a telephone call to the State Bar. As we have in the past, we decline to extend further the duty we already recognize in the IRS to ascertain taxpayers' addresses. *See id.; King v. Commissioner,* 857 F.2d 676, 680 (9th Cir. 1988). Because the IRS need not have pursued the methods Breen suggests to ascertain this current address, we cannot say that the IRS knew Breen's current address and yet misrepresented to the Tax Court its inability to locate Breen.

Second, even if the IRS had constructive knowledge of Breen's address, as Breen argues, and thus misrepresented its inability to locate him to the Tax Court, we disagree that such conduct constitutes fraud on the court. "Fraud on the

court must involve 'an unconscionable plan or scheme which is designed to improperly influence the court in its decision.' " *Abatti,* 859 F.2d at 118 (quoting *Toscano v. Commissioner*), 441 F.2d 930, 934 (9th Cir. 1971). A failure to use its constructive knowledge may well amount to IRS negligence, but it does not arise to an unconscionable plan to influence the Tax Court improperly. [1]

2. Demand for an Evidentiary Hearing.

Breen argues that the Tax Court should have granted him an evidentiary hearing wherein he could show IRS fraud on the court to invalidate the Tax Court's final judgment against him. We agree with the Tax Court, however, that Breen failed to allege facts sufficient to merit an evidentiary hearing. Breen's argument that the IRS had constructive knowledge of his current address, as we have discussed, does not arise to a prima facie allegation of fraud on the court entitling Breen to an evidentiary hearing.

Moreover, the record shows that regardless of IRS assertions to the court about attempts to contact Breen, the Tax Court did not abuse its discretion in dismissing Breen's petition. As a petitioner before the Tax Court, Breen had a continuing duty to apprise the court of his current address. Tax Ct. Rule 21(b)(4). Breen's failure to fulfill this duty prevented him from receiving Tax Court notices of his pretrial conference and trial dates. Therefore, Breen himself, and not the IRS or Tax Court, bears responsibility for failing to receive these notices and for failing to appear. Because Breen failed to appear at his pretrial conference and trial,

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[1] We note that government counsel assured this court at oral argument that he checked with counsel for the IRS who stated he did in fact make independent efforts to locate Breen as the IRS represented to the Tax Court in support of its motion to dismiss. Because this information is outside the record, however, we resolve Breen's allegation of fraud on the court on other grounds.

the Tax Court was well within its discretionary powers to dismiss Breen's petition. *See King*, 857 F.2d at 681 (we may "affirm on any basis clearly supported by the record").

3. Alleged Due Process Violation

Breen argues finally that the IRS denied him due process by giving notice of its motion to dismiss and moving for dismissal on the same day, thus assuring Breen would have no opportunity to respond. We conclude, however, that if any such error did occur, it was harmless. Had Breen fulfilled his duty to apprise the Tax Court of his current address, he would have received notice of his trial date when he could have opposed the IRS motion to dismiss. Moreover, even absent the IRS motion to dismiss, the Tax Court could have dismissed Breen's petition sua sponte for his failure to appear at pretrial conference or trial. Like Breen's claim of fraud on the court, therefore, Breen's due process argument fails. Regardless of IRS conduct in giving notice of its motion to dismiss, the Tax Court did not abuse its discretion in dismissing Breen's petition because of Breen's own failure to abide his duty as a Tax Court petitioner.

AFFIRMED.